No. 98-404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANTS

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Statement of Interest of *Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc. (LDF) was incorporated in 1939 for the purpose, *inter alia*, of rendering legal aid free of charge to indigent "Negroes suffering injustices by reason of race or color." Its first Director-Counsel was Thurgood Marshall. The Legal Defense Fund has participated, either as counsel to a party or *amicus curiae*, in numerous cases in this Court involving the right of African Americans and other racial minorities to vote and participate in the political process on an equal and nondiscriminatory basis, *see, e.g., Reynolds v. Sims*, 377 U.S. 533 (1964); *Thornburg v. Gingles*, 478 U.S. 30 (1986), and in cases involving the authority of government officials to take action against discrimination and its effects, *see, e.g., Bob Jones University v. United States*, 461 U.S. 574 (1983); *see generally N.A.A.C.P. v. Button*, 371 U.S. 415, 422 (1963) (describing Legal Defense Fund as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

This case implicates both of those longstanding concerns. The right to be counted in the decennial census is inextricably intertwined with the right to equal representation. Moreover, the eradication of discrimination depends critically on recognizing both the authority and the responsibility of government officials, like the Secretary of Commerce here, to take actions that advance fairness and equality.

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*Pursuant to the Court's Rule 37.6, *Amicus* certifies that no portion of this brief has been authored by counsel for any of the parties and that no monetary contribution toward the preparation or submission of this brief has been made by any person or entity other than the *Amicus Curiae*. The parties' letters of consent to the filing of this Brief have been lodged with the Clerk.

Introduction

The centerpiece of the Nation's democratic process is the right to equal representation. Article I, § 2 of the United States Constitution, as amended, provides that States be represented in Congress "according to their respective numbers," and this Court has long recognized a personal, Fourteenth Amendment right to an "equally effective voice" in the election of the government. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

Recognizing that the constitutional mandate of "equal representation for equal numbers of people," *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964), could only be realized if those people are accurately counted, the Framers made provision for a decennial census, U.S. Const. art. I, § 2, to be taken "in such Manner as [Congress] shall by Law Direct," *id.* Congress, in turn, has conferred broad power on the Secretary of Commerce, 13 U.S.C. § 141, who has the authority to take the decennial apportionment census "in such form and content as he shall determine," *id.*, § 141(a).

Census data supply the basis for reapportionment of the House of Representatives, *see* 2 U.S.C. § 2a, for drawing new congressional districts, *see Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (the census count "is the only basis for good faith attempts to achieve population equality"); *id.* at 731 ("Adopting any standard other than population equality, *using the best census data available*, would subtly erode the Constitution's ideal of equal representation") (emphasis supplied), and, as a practical matter, for State and local redistricting decisions, as well, *see* 13 U.S.C. § 141(c). And just as an accurate census is critical to achieving the constitutional ideal, deviations from accuracy, as the District Court in this case acknowledged, risk malapportionment and vote dilution. *See United States House of Representatives v. United States Department of Commerce*,

1998 U.S. Dist. LEXIS 13133, at *4 (D.D.C. 1998) (three-judge court) (hereinafter cited as "*U.S. House*").

a. The Differential Undercount and Its Consequences

There is no dispute that the census has, consistently, fallen short of its goal of providing an accurate, actual enumeration of the United States population. Rather, "[i]t is thought that [there has been] . . . a net 'undercount' of the actual American population in every decennial census." *State of Wisconsin v. New York City*, 517 U.S. 1, 6 (1996).

Moreover, these shortfalls have not been evenly distributed: groups that have historically been denied access to the political process -- African Americans, Latinos, and Native Americans among them -- have been found to suffer the highest rates of undercount. As the decision of the court below in this case recognized, this differential undercount (with its concomitant threats to equal representation) is "among the most troubling aspects of the census in the late 20th century," 1998 U.S. Dist. LEXIS 13133, at *4 n.2; *see also Wisconsin*, 517 U.S. at 7 (acknowledging differential undercount of African-Americans in 1980 census); *City of Detroit v. Franklin*, 4 F.3d 1367, 1371 (6th Cir. 1993) (noting that in the 1990 Census African Americans and other minorities were undercounted to a greater degree than non-Hispanic whites); *Tucker v. Department of Commerce*, 958 F.2d 1411, 1412-13 (7th Cir. 1992) (same).

Finally, both the general undercount and the disparate undercounting of racial and ethnic minorities persist. In fact, both problems were found to have been of greater magnitude in the most recent census than they had been in its predecessor: "'For the first time since the Census Bureau began conducting post-census evaluations in 1940, the decennial census was *less* accurate than its predecessor.'" *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *3 (quoting United States Department of

Commerce, Bureau of the Census, *Report to the Congress – The Plan for Census 2000* (revised August 1997) ("Census Report") at 2); *The Challenge of the Count: Hearing before the House Committee on Government Reform and Oversight*, 104th Cong., 2d Sess. 4 (June 6, 1996) (Statement of Rep. Collins) ("For the first time in 50 years, the differential between the African-American undercount and the white undercount went up"). The Bureau has found that the 1990 Census excluded 4.4 percent of African Americans, 5.0 percent of Hispanics, and 12.2 percent of Native Americans living on reservations, as against only 0.7% of the non-Hispanic white population. *See* Census Report at 3-4 Indeed, each of the ten congressional districts most affected by the 1990 undercount has a minority population in excess of 62%:

District	Net Undercount		% African-American	% Hispanic
	Number	Rank		
NY 16	40,245	1	33.6	60.2
NY 11	36,123	2	70.4	11.6
NY 15	35,705	3	37.1	46.9
CA 35	35,604	4	41.3	43.0
CA 37	31,201	5	33.1	45.1
NY 12	30,561	6	8.9	58.6
NY 10	30,471	7	57.4	19.9
CA 32	30,174	8	39.1	30.4
CA 33	28,678	9	3.8	84.1
CA 20	27,982	10	6.1	56.3

Mark Girsh and Ken Strasma, *1990 Census Undercount by Congressional District*, September 20, 1998 (National Committee for an Effective Congress).

In these districts, the votes of minority citizens were given less weight as compared to districts in which residents were accurately counted, a result that this Court has held is tantamount to a direct barrier to the right to cast a ballot: "[The] right of suffrage can be denied by . . . dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555; *cf. Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993) (noting danger of vote dilution that arises from "packing" minority voters in single district).

b. The Governmental Response

The undercount problem has been the subject of intensive study, both inside and outside the Census Bureau, for nearly three decades. In the years leading up to and immediately following the 1990 Census, serious consideration was given to using statistical methods to yield a more accurate population count, *see Wisconsin*, 517 U.S. at 7-12; 56 Fed. Reg. 33,582 (July 22, 1991), and official concern intensified as the troubling aspects of the 1990 count became known. Consequently, in 1991, Congress directed that the National Academy of Sciences be commissioned to study ways in which the government could achieve the most accurate census possible. *See* Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (1991), codified at 13 U.S.C. § 141 (note).

In addition to offering numerous other recommendations aimed at improving the quality of the census, the three panels convened by the Academy were unanimous on one point: that proper use of statistical sampling techniques would improve the accuracy of the Census. *See U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *5. In light of these studies, as well as its "ninety

years of census-taking experience, meetings with the public in thirty cities, congressional input, and advice from no fewer than six advisory committees," *id.* at *5-*6, the Census Bureau developed its design for conducting the 2000 Census. In addition to its many planned efforts to improve the efficacy of conventional census-taking techniques, *see id.* at *6 n.3, the Bureau has indicated its intention to make use of statistical sampling methods that will make the census more accurate.

Pursuant to a statutory provision enacted into the 1998 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2440, 2480-87 (1997), plaintiff-appellee United States House of Representatives brought suit challenging the legality (on both constitutional and statutory grounds) of the Bureau's planned course. Without reaching the House's constitutional arguments, the court below accepted the House's argument that any use of statistical sampling in connection with apportionment was irreconcilable with the strictures of the Census Act, 13 U.S.C. §§ 1 *et seq.*

As we demonstrate below, that decision was incorrect as a matter of statutory interpretation, is especially troubling in light of the constitutional purposes the census must serve and threatens to result in a decade of unequal representation and minority vote dilution that the Apportionment Clause, the Fourteenth and Fifteenth Amendments and the Due Process Clause of the Fifth Amendment proscribe.

Summary of Argument

The question this case presents is whether the Census Act, 13 U.S.C. § 1 *et seq.*, must be read as requiring that the Secretary of Commerce conduct a census that (1) in the expert judgment of the Census Bureau, would not be accurate; (2) would result in the abridgement of the votes of minority citizens; and (3) would lead to inevitable and wholly unjustifiable

inequalities in apportionment. The court below, relying on isolated and concededly ambiguous language in one statutory section, ruled that Congress had, in fact, compelled such an extraordinary result. That decision reflects two critical errors.

First, ordinary rules of statutory interpretation establish that the statute that the Court is called upon to construe includes no such troubling limitation on the Secretary's ability to conduct a fair and accurate census. Rather, the provision specifically conferring authority on the Secretary to "take a decennial census of the population," 13 U.S.C. § 141(a), also includes express and clear provision for the Secretary to use "sampling procedures" -- a grant of power that would be a nullity if the reading adopted below were correct. It is in light of this provision (and § 141(b), which further clarifies that the "tabulation" made under subsection (a) is the one to be used for "apportionment of Representatives in Congress") that the "except for . . ." clause that so troubled the court below, *see* 13 U.S.C. § 195, may properly be understood: not as a bar on all apportionment-related use of statistical sampling, but as an exemption from an otherwise mandatory obligation to use such methods -- and as evidence of Congress's longstanding commitment to census accuracy.

Because this is the only interpretation that is fully consistent with the statutory text, this Court's statutory interpretation cases teach that the judicial inquiry "is at an end." *See, e.g., Sullivan v. Stroop*, 496 U.S. 478, 485 (1990). But even if the statute as a whole could be said to be ambiguous with respect to apportionment-related sampling (as opposed to §195, which, standing by itself, undeniably is ambiguous), the principles announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), would oblige the Court to accept the Secretary's interpretation. *Chevron* requires that "substantial deference [be] accorded to

the interpretation of the authorizing statute by the agency authorized with administering it," *Rust v. Sullivan*, 500 U.S. 173, 184 (1991) (citing *Chevron*, 467 U.S. at 844), a rule that applies even when "[t]he court . . . conclude[s] that the agency construction was not the only one it could permissibly have adopted . . . or even the reading the court would have reached" as a matter of first impression, *Chevron*, 467 U.S. at 843 n.11. This obligation applies with special force here, because the statute at issue has been read by this Court to confer Congress's "virtually unlimited discretion" on the Secretary, *see Wisconsin*, 517 U.S. at 19; *see also id.* at 20 (Secretary's decision "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census"). The court below erred seriously in refusing to give effect to this principle.

Indeed, even absent deference, the interpretation accepted below -- whereby Congress uniquely and categorically withheld authority to use of "the statistical method known as 'sampling'" in conjunction with apportionment -- would make scant sense. So long as the Secretary is authorized to use other statistical techniques (which have precisely the same alleged "vices" attributed to the "method known as 'sampling,'" *see infra*) and is otherwise vested with broad discretion to adjust the census as he sees fit, *see generally Franklin v. Massachusetts*, 505 U.S. 788 (1992), the prohibition read into the statute by the court below serves no purpose other than to hamper the taking of a census that -- in the judgment of the Census Bureau and of an extraordinary array of outside statistical experts -- would be both more accurate and more fair. *See Wisconsin*, 517 U.S. at 19-20 (review under the Apportionment Clause must not lose sight of "'the constitutional goal of equal representation'") (quoting *Franklin*, 505 U.S. at 804).

Nor is the result reached below compelled by the language -- or the *lacunae* -- of the pertinent legislative history

or by the need to steer clear of any serious constitutional question. To the contrary, the committee reports explaining the 1976 amendments to the Census Act are fully supportive of the Secretary's authority, and familiarity with events leading up to those amendments make the construction given below seem that much more strained. As for "constitutional avoidance," the argument that the Constitution's reference to an "actual Enumeration," U.S. Const. art. I, § 2, rules out use of reliable and valid statistical methods of ascertaining the population proves to be insubstantial -- and therefore provides no basis for giving the Act an unnatural and illogical construction.

In fact, the serious constitutional considerations are all on the other side of the argument, and that is the second error of the decision below: failure to "keep[] in mind the constitutional purposes of the census," *Wisconsin*, 517 U.S. at 20, in construing the Act. *See Wesberry*, 376 U.S. at 18 (there "is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives"). The court below treated as irrelevant the fact that the census planned by the Commerce Department has been determined to be more fair and more accurate in all constitutionally relevant respects, and less likely to yield discriminatory results than any alternative. In light of the purpose of the census, it would be extraordinary to construe the Secretary's authority to conduct an accurate census more narrowly than his discretion not to do so, *see Wisconsin*, especially because the former course implicates the Executive's independent responsibility to advance equality and nondiscrimination. *See Bob Jones University v. United States*, 461 U.S. 574 (1983). Indeed, a census conducted with unjustified disregard for expert and administrative judgments concerning accuracy would raise serious constitutional questions, even under the forgiving standard announced in *Wisconsin*.

ARGUMENT

I. Straightforward Principles of Statutory Construction Foreclose the Interpretation Given the Census Act by the Court Below

The decision below took an extremely unorthodox and circuitous approach to construing the pertinent statute. Even while professing to be giving effect to the unambiguous "plain meaning" of the statutory text, *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *68 n.11, the District Court in fact conceded that the language of the lone clause supporting its interpretation, 13 U.S.C. § 195, is susceptible to two critically different readings: one, authorizing (but not requiring) sampling techniques in conjunction with apportionment and the other prohibiting them. *See id.* at *75-76 (noting that permissive reading is correct in "some instances," but that prohibitory one is right "more often than not"). To resolve that ambiguity, the court turned not to the text of other provisions of the same statute or to the interpretation of the executive agency charged with administering it, *see infra*, but rather to the text and legislative history of an earlier version of the provision. Interpreting that history as ruling out use of statistical sampling in conducting (or correcting) the decennial census, the court then returned to the current, amended version of the provision, holding that while its text had been changed, there was insufficient clamor evident in the legislative history of the 1976 amendments to infer that Congress had, in fact, backed away from (what the court took to be) its prior position. Only then did the court look to the current (amended) version of 13 U.S.C. §141, concluding that the provision could not mean what it says, *i.e.*, that the Secretary is authorized to take the decennial census "in such form and content as he shall determine, including the use of sampling procedures," because that reading would be in conflict with the "more specific" language in 13 U.S.C. §195,

which, according to a venerable canon of construction, must control. *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *88.

A. The Plain Terms of the Statute Authorize the Use of Statistical Sampling to Correct the Inaccuracies in the Apportionment Census

This was not the right way to read a federal statute. Once it is recognized that the "except . . . shall" statutory language may be construed either as permissive -- as it is in other provisions of the U.S. Code, *see, e.g.*, 16 U.S.C. § 460w-4 -- or prohibitory, the proper response is not to embark on the sort of "detective[]" work, *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *80, for which the judiciary is ill-equipped (*i.e.*, discerning the "background knowledge" of the legislators who enacted the provision). Rather, the court should seek the answer in the text and structure of other provisions of the same statute. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988).

Such an exercise produces a satisfying result in this case: while §195 is ambiguous, §141 is not. It straightforwardly authorizes use of "sampling procedures" in conjunction with the "decennial census," 13 U.S.C. § 141(a), and indeed makes explicit that the census it authorizes is the one that must be used for apportionment purposes, *id.*; *see also id.*, § 141(b). Giving this provision its plain meaning neither conflicts with nor renders superfluous the "except for" language of section 195. *Cf. United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) ("a statute must, if possible, be construed in such fashion that every word has some operative effect"). Rather, that clause performs an important purpose, providing that sampling, although mandated in connection with other of the Secretary's census responsibilities, is discretionary with respect to apportionment-related enumeration.

The reading settled on below does not have this virtue. Rather than construing the two (simultaneously enacted and amended) provisions as consistent with one another, it finds them to be in conflict, and, declaring § 141 to be the "less specific," deprives it of any legal significance. *But see Pittsburgh & L. E. R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989) ("when two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *Stone v. Internal Revenue Service*, 514 U.S. 386, 397 (1995) ("when Congress acts to amend a statute, we presume that it intends its amendment to have real and substantial effect").

B. The Secretary's Determination Is Owed Deference

In fact, the unconventional methodology used by the court below would have been inappropriate even were there not a provision like §141 at hand to resolve the ambiguity inherent in the phrasing of §195. This Court's cases require that, in the absence of clear textual direction, a court must accept the construction of the Executive official charged with administering the statute, unless that interpretation is unreasonable. *See Chevron*, 467 U.S. at 843 (deference principles apply in cases of both statutory silence and ambiguity). Indeed, the Court's decisions in *Wisconsin* and *Franklin* articulated, if anything, an even more deferential standard, directing that "so long as the Secretary's conduct of the census is 'consistent with the constitutional language and the constitutional goal of equal representation,'" it must not be overturned. *See Wisconsin*, 517 U.S. at 19-20 (citing *Franklin*, 505 U.S. at 802); *see also* 517 U.S. at 20 (Secretary's decision whether or not to adjust "need bear only a reasonable relationship to the accomplishment

of an actual enumeration of the population, keeping in mind the constitutional purpose of the census").[1]

In a single footnote, *see U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *68 n.11, the court below declared this obligation to be inoperative in this case, on the ground that (1) the plain meaning of the statute is clear; (2) the Secretary had reversed his position on the issue; and (3) he had not "'amply justified his changed interpretation with a reasoned analysis,'" *id.* (quoting *Rust v. Sullivan*, 500 U.S. at 187, and *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983)).

The three reasons proffered do not state a valid basis for disregarding the *Chevron* rule in this case. First, as explained above, the District Court decision itself acknowledged that the meaning of even the most helpful statutory provision cannot be said to "plainly" rule out all use of sampling. As for the second and third distinctions, *Chevron* rejected the assertion that agency interpretation is undeserving of deference whenever "it represents a sharp break with prior interpretations," 467 U.S. at 862; *see also Smiley v. Citibank*, 517 U.S. 735, 742 (1996) ("change is not invalidating, because the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"), and, as is explained below, any suggestion that the Secretary's decision to incorporate statistical methods in the 2000 Census was not supported by "reasoned analysis" is wholly untenable.

As an initial matter, the challenged interpretation reflects no recent shift in the administrative understanding of the statute,

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[1] In *Wisconsin*, the Court treated the statutory grant of power (and discretion) to be essentially coextensive with that conferred on Congress by the Constitution. *See* 517 U.S. at 19; *but cf. id.* at n.10 (declining to address possible relevance of § 195).

see Smiley, 517 U.S. at 742 (noting that a "[s]udden and unexplained change" is more likely to be adjudged "arbitrary and capricious"). The view that §195 does not foreclose use of sampling to correct for undercounting was taken by the previous administration, which regarded the decision whether or not to use sampling data, *see Wisconsin*, as one committed (by § 141) to the Secretary's discretion. *See* 56 Fed. Reg. at 33,605-06. That view, in turn, reflected the unanimous interpretation of federal courts that had examined the statute, *see City of New York v. U.S. Department of Commerce*, 739 F. Supp. 761, 767 (E.D.N.Y. 1990) ("It is no longer novel, or in any sense, new to declare that statistical adjustment of the decennial census is both legal and constitutional"), *rev'd on other grounds*, 34 F.3d 1114 (2d Cir. 1994), *rev'd on other grounds sub nom. State of Wisconsin v. New York City*, 517 U.S. 1 (1996); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 679 (E.D. Pa. 1980); *Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), and that of the Department of Justice, the GAO, and the Department of Commerce Inspector General. *See* Census Report at 54.

Second, the decision to reconsider use of a statistical method in light of evolving scientific knowledge is the sort of policy change that should excite the least judicial suspicion under any circumstances. *Compare Rust*, 500 U.S. at 187 (relying in part on administration's "shift in attitude against the 'elimination of unborn children by abortion"); *cf. Chevron* 467 U.S. at 863 (noting that challenged decisions arose "in a technical and complex arena"). Indeed, *Chevron* teaches that informed agency rulemaking "*must* consider varying interpretations and the wisdom of [existing] policy on a continuing basis." 467 U.S. at 863 (emphasis supplied). Previous administrations gave serious consideration to these

methods, ultimately determining that further testing and refinement were needed before they should be used in conjunction with apportionment.[2]

Indeed, it is not easy to fathom how an observer familiar -- as the opinion of the court below shows it to have been, *see* 1998 U.S. Dist. LEXIS 13133, at *5-6 -- with the lengthy, rigorous and scholarly consideration given the undercount correction question by the Secretary, the Census Bureau, and numerous outside advisors could possibly find the ultimate decision not to rest on "reasoned analysis." As the lower court itself reported: The use of sampling methods to improve the accuracy of the census has been under intensive study within the Census Bureau and in the statistical community for more than a decade; public hearings were held in thirty cities; the views of no fewer than six federally chartered outside advisory committees -- representing, among others, the American Statistical Association, the American Population Association, and the American Economic Association -- were solicited. *See* Census Report at 8-9.

Nor was this reconsideration instigated (or accomplished) unilaterally by the Executive Branch: Congress enacted the law providing for the National Academy of Sciences (NAS) to study "the means by which the Government could achieve the most accurate population count possible," including "the appropriateness of using sampling techniques, in conjunction with basic data-collection techniques or otherwise,"

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[2]The main theme of Secretary Mosbacher's decision not to approve adjustment was that sampling should be studied further before being implemented. That has now been done. A second major concern was "distributive accuracy," *i.e.*, that the sample conducted in 1990, although undeniably more accurate at the national level, was not so clearly superior as among the States and at the sub-State level. *See also Wisconsin*, 517 U.S. at 22 (noting that sample used other States to determine a State's apportionment). That criticism has been addressed directly in the plan for 2000.

see the Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, 105 Stat. 635 (1991) -- a process that resulted in unanimous judgment of three separate NAS panels that sampling was appropriate. Thus, by almost any measure, the Secretary's determination to incorporate statistical sampling methodology to improve the accuracy of the 2000 census must rank among the most well-informed and carefully considered decisions in the recent history of the Executive Branch; the deliberative process in *Rust* -- and almost any other instance of agency decisionmaking -- appears capricious in comparison. On no even possibly correct reading of *Chevron* and *Rust*, then, can this rigorous and prolonged study of the question -- enlisting countless outside experts in the design, analysis, and implementation of the Census Plan -- be said to constitute an insufficiently "reasoned basis" for the Secretary's decision.

C. The Decision Below Erred in Giving Dispositive Weight to (Relative) Legislative Silence

A distinctive feature of the conclusion reached by the court below is that it did not rest primarily on positive legislative history supporting its thesis – *i.e*, any explicit indications in the committee reports that the 94th Congress understood the amended § 195 as an absolute ban on considering statistical sampling in connection with apportionment -- nor even on congressional silence. To the contrary, the relevant legislative materials are fully consonant with the Secretary's interpretation, and they provide no positive support for the contrary position. *See, e.g.*, S. Rep. No. 94-1256 at 1 (1976) (explaining that § 141(a) contains "new language . . . to encourage the use of sampling in the taking of the decennial census"); *see also id.* at 6 (explaining that § 195 "as amended strengthens congressional intent that, whenever possible, sampling shall be used"); H.R. Rep. No. 94-944 at 6 (under amendments, sampling should be used "whenever possible").

Instead, the ruling below places unusual faith in its judgment that the "'watchdog . . . did not bark in the night,'" *U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *80 (quoting *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) and *Harrison v. PPG Industries, Inc*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)), *i.e.*, a perception that the legislative history of the 1976 amendments is neither as extensive nor as explicit as would be expected had Congress jettisoned the categorical prohibition the court believed it to have established two decades earlier (not to mention the alleged "two hundred year tradition" of not using statistical methods).

There are two problems with this approach. First, as a general matter, the many reasons -- both constitutional and empirical -- for hesitating before relying on legislative history over statutory text, *see Shannon v. United States*, 512 U.S. 573 (1994); *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law"); *see generally Conroy v. Aniskoff*, 507 U.S. 511, 519, 527-28 (1993) (Scalia, J., concurring), only multiply when it is "silence" in the legislative history that is held out as trumping expression in the text. There is no requirement that Congress make its views known in any form other than an enacted statute, *see* U.S. Const. Art. I §7; *see generally Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 419 (1992) ("Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning").[3] The perils are

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[3] *Accord Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496-97 n.13 (1995) ("congressional silence, no matter how 'clanging,' cannot override the words of the statute"); *Stone v. Internal Revenue Service*, 514 U.S. at 397 ("when Congress acts to amend a statute, we presume that it intends its amendment to have real and substantial effect"). *Cf. Perez v. United States*,

most acute, however, where, as here, the argument for disregarding statutory text is not based on silence in the legislative history, but rather on a perception that Congress was not as loud as it might be expected to have been. *See U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *83.[4]

Second, consideration of general validity aside, the "bark" hypothesis has particularly little explanatory power in this case. The theory assumes that, before amending the Act in 1976, Congress understood the limitations of § 195 to be as stringent as the court below believed them to be based on its reading the text and legislative history of the 1957 version. In fact, the Congress that amended the Census Act in 1976 had more to consider than the cold text of the 1957 version and its accompanying committee reports. The understanding of the Committee that would eventually report out the 1976 amendments as to the scope of the Secretary's authority was informed by its experience overseeing the conduct of the 1970 Census, which had -- notwithstanding § 195 -- used two statistical methods similar to those proposed for 2000 (albeit less sophisticated or extensive) and had added more than 1,500,000 people to the total generated by "traditional" "headcount"

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402 U.S. 146, 156 (1971) ("Congress need [not] make particularized findings in order to legislate").

[4]*Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991), relied upon below, involved a starkly different situation. There, the purpose of 1982 amendments (and of the disputed statutory provision, in particular) was to expand the reach of the Voting Rights Act, a theme that pervades the legislative history and the text of the Act, making the argued-for implied limitation highly improbable. By contrast, the thrust of the 1976 Amendments was wholly in the direction of favoring use of sampling.

methods.[5] *See Hearings before the Subcommittee on Census and Statistics of the Committee on Post Office and Civil Service*, 91st Cong., 2d Sess. 6 (1970); Report on Accuracy of the 1970 Census Enumeration, H.R. Rep. No. 91-1777, 91st Cong., 2d Sess., at 22 (1971); *Programs to Reduce the Decennial Census Undercount*: Report to the House of Representatives Committee on Post Office and Civil Service by the Comptroller General of the United States, GAO Rep. No. GGD-76-72 (1976).[6]

Rather than "bark" -- and object to methods that seemingly transgressed the hypothesized statutory and constitutional barriers to statistical adjustment -- the Committee

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[5]It is not wholly correct to refer to the methods for conducting the census as either "traditional" or a "headcount." As for the former, the 1970 census had, in a distinct break with the past, turned to mail-in "self-enumeration," after nearly two centuries of door-to-door visiting by census-takers. *See* Pub. L. No. 88-530, 78 Stat. 737 (1964) (eliminating requirement of in-person visit by enumerator). As for the "headcount," the image of a physical count obscures the extent to which self-reporting and other forms of hearsay, *see U.S. House*, 1998 U.S. Dist. LEXIS 13133, at *8 (noting use of "proxy data" in 1990 census), rather than in-person, one-by-one "reckoning" have long been the basis for the enumeration.

[6]First, the Bureau, concerned that a substantial share of the housing units reported to be "vacant" were, in fact, occupied, undertook a "post vacancy re-check," whereby 13,546 of the units recorded as vacant were re-surveyed. When it was found that 11% of this sample were, in fact, occupied, the Bureau decided that it would deem 11% of the all units rated vacant to be "occupied," as well. Then, to determine the number of additional people these housing units would contribute, the Bureau resorted to a statistical method known as "imputation," whereby each unit would be considered to be occupied by the same number of people found in households with similar characteristics. This effort resulted in the addition of 1,069,000 people to the 1970 census count. A second effort, known as the "Post Enumeration Post Office Check," used a similar methodology to correct for the undercount of rural populations in 16 southern states, resulting in the addition of another 480,000 people to the final census figure.

that drafted the provisions that ultimately became law in 1976 applauded the Bureau's efforts. The Committee pronounced itself "most impressed with the effectiveness of the Post Office Check as a check on the adequacy of the enumeration coverage in the conventional door-to-door enumeration areas" and urged further appropriations for similar programs in the future. *See* Report on Accuracy of the 1970 Census Enumeration, H.R. Rep. No. 91-1777, at 22, 37, 41.

This background in turn, suggests a wholly different and more plausible explanation for what the court below found so telling: the relative absence of hue and cry accompanying the 1976 amendments. If (whatever the initial intent of the 84th Congress) the 94th Congress interpreted § 195 as a limitation not on the Secretary's authority to use statistical methods to supplement (and correct) data gathered through more traditional means, but as, at most, affecting his freedom to substitute less accurate measures for the (assumed) more accurate, but more cumbersome physical collection methods, amendments confirming that understanding or even committing all apportionment-related sampling decisions to the Secretary's discretion would not have elicited much of a "bark."

D. A Complete Prohibition on the "Statistical Method Known as 'Sampling'" -- and Only that Method -- Would Make No Sense

Indeed, this reading suggests an answer to one of the central difficulties facing the statutory interpretation upon which Plaintiff has insisted: If Congress had been concerned (as was argued below) with respecting an alleged distinction between "actual enumeration" ("counting") and "estimation," what reason would there be to limit the "prohibition" of § 195 to "the statistical method known as 'sampling'"? Other methods of correction -- such as imputation -- share precisely the same "vice" attributed to "sampling": generalizing from (sophisticated

and statistically valid) assumptions about homogeneity of subpopulations.[7]

The most plausible basis for distinguishing "sampling" from these other methods is that the others were believed to yield exclusively accuracy-improving adjustments, whereas sampling may have been seen as having a more dual nature, laudably increasing accuracy when used as a "check" on more imprecise methods, but decreasing it if used as a substitute for the Department's traditional (and presumed-to-be more accurate) methods. Such a reading brings the main thrust of § 195 into line with Congress's prime responsibility under the Constitution: to assure an accurate census. So understood, the statute distinguishes apportionment from other activities -- not for the purpose of limiting the Secretary's discretion to use scientifically valid methods to improve the accuracy of the apportionment census -- but rather to emphasize that, with respect to this one paramount responsibility, accuracy should not be sacrificed.[8]

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[7]The only alternative would be to construe the alleged prohibition on "the statistical method known as 'sampling'" as extending to all statistical methods, including, for example, imputation. But that is an interpretation that the statute's language cannot possibly bear -- especially when read in light of the 94th Congress's familiarity with the Census Bureau's then-recent use of imputation.

[8]Plaintiff has raised the specter that, under Defendants' reading, nothing in the statute would prevent the Secretary from adopting a census based entirely on statistical methods. That is a red herring. First, that hypothetical is far removed from the census actually planned for 2000 -- which, among other things, provides for multiple, individual contacts with every known household in the Nation and which represents only an incremental change from 1990 -- and one supported by substantial scientific consensus. As a practical matter, there is no such consensus for a fundamentally different methodology, and any such drastic change would require the cooperation of Congress (which would have to appropriate funds and retains ultimate authority to "direct" the manner in which the census is taken) and the approval of the judiciary, which would

E. The Constitutional Argument Against the Planned Census Is Insubstantial

Indeed, the only arguable virtue of reading the statute the way the decision below did is that it relieved the court of responsibility for determining whether the Constitution, by its own force, prescribes that the census entail some sort of physical headcount (and only that). *See Rust v. Sullivan*, 500 U.S. at 191 (noting principle that "a statute must be construed, if fairly possible, so as to avoid . . . grave doubts" as to its unconstitutionality). That "constitutional" argument, however, is not serious enough to warrant the Court's avoiding it by constructing a very different -- and far more constitutionally troubling, *see infra* -- statute than the one Congress actually enacted. *Cf. Rust*, 500 U.S. at 191 ("avoidance of a difficulty will not be pressed to the point of disingenuous evasion") (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)).

The crux of the claim that the purported prohibition on statistical sampling is of constitutional magnitude rests on an interpretation of the phrase "actual Enumeration." The intended meaning of "actual Enumeration" becomes quite clear when considered in the full context of the constitutional language:

> Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers. . . . The actual Enumeration shall be made within three Years after the Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . . [U]ntil such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three,

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review the Secretary's decision for consistency with the standard announced in *Wisconsin*.

> Massachusetts eight, Rhode Island and Providence plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

As the context makes clear, the phrase "actual Enumeration" is used not to prescribe (or proscribe) a particular manner for taking the census but rather to distinguish the contemplated decennial census from the first, provisional allocation of House seats -- a political compromise that was neither based on any attempt to determine accurately the populations of the States, nor reflective of any single, precise principle of apportionment.

In the court below, the Plaintiff gathered numerous definitions of "actual" and "enumerate" extracted from contemporaneous dictionaries, in the service of an argument that the Framers understood the two words together to bind their descendants to a particular method of census-taking. But there are numerous problems with this sort of "originalism."[9] First, the term "enumerate" does not appear in the text of the Constitution, while the word that does, "enumeration" (which is often used to mean a total, without regard to the method used

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[9]Indeed, it is arguably not originalism at all. The apportionment for which the 2000 Census will be used is not the one contemplated in Article I, but rather the one provided for in the Fourteenth Amendment. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring) (noting that practices at time of ratification of Fourteenth Amendment may be "more relevant" than those of the eighteenth century in interpreting Free Speech Clause, as "incorporated"). There is no evidence that the Framers and ratifiers of the Fourteenth Amendment considered census-taking methodologies, but there can be little basis for believing, in light of the other commitments contained in that Amendment and contemporaneously enacted legislation, that they would prefer, let alone prescribe a method that would lead to the diminution the rights of individuals only recently and belatedly recognized as "whole persons" in the eyes of the law. *See generally* Br. Amici Curiae of the Brennan Center for Justice, *et al.*

to arrive at it), appears to have been a last-minute, unexplained substitute for "census." More important, while there was broad and divisive debate about the basis for representation in the House -- with apportionment according to population emerging as the dominant principle -- there is no record of discussion about the manner in which the population would be ascertained, a silence reinforced by the textual delegation to Congress of authority to "direct" "the manner" by which the decennial census would be conducted.

II. The Census Act May Not be Interpreted in Isolation from its Constitutional and Statutory Context

This Court's cases affirm that no census may be conducted that is not "consistent with the . . . constitutional goal of equal representation." *Wisconsin*, 517 U.S. at 19-20. Although the straightforward principles of statutory interpretation discussed above suffice fully to establish the correctness of the Secretary's understanding, the court below also committed a serious error in failing to "keep[] in mind," *id.* at 20, the purposes of the census. Had the decision done so, it would not have treated as irrelevant the acknowledged inaccuracies that would result from overruling the planned Census (and the constitutionally troubling consequences that would ensue) and would have construed the Executive's authority to take measures to prevent and correct discrimination and inequality to be no less broad than the discretion not to do so upheld in *Wisconsin*.

A. The Executive Branch has Distinct Power and Responsibility to Assure Political Equality

The Secretary's authority to use accuracy-enhancing statistical techniques derives important support from the unique and constitutionally sensitive purposes that the census data have come to serve. In addition to their mandatory role in the allocation of seats in the House of Representatives, 2 U.S.C. §

2a, the population figures derived from the 2000 census will, for all practical purposes, determine States' drawing of congressional districts, *Karcher*, 462 U.S. at 738 (the census count "is the only basis for good faith attempts to achieve population equality"); *id.* at 731 ("adopting any standard other than population equality, *using the best census data available*, would subtly erode the Constitution's ideal of equal representation") (emphasis supplied), and will affect the apportionment of political power at every level of State and local government, as well. *See* 13 U.S.C. § 141(c). The consequences of inaccuracy -- and especially differential inaccuracy -- are thus extraordinarily serious, and the Secretary's authority should not lightly be construed as preventing him from acting to prevent such inequitable and constitutionally troubling results.

In addition to the real and persistent possibility that a State with a disproportionately high undercount will not be represented in Congress "according to" its "numbers," *see Wisconsin* -- a condition that is in palpable tension with the plain words of the Constitution, the hazards of the undercount at the congressional district level are even more ominous and pervasive. The magnitude of the distortions inherent in the differential undercount, *see, e.g.*, table *supra* p. 4, far exceed the sorts of modest deviations from strict population equality that have been held to offend the equal representation principle of Article I. *See Karcher v. Daggett* (rejecting congressional redistricting plan with total deviations as small as .70 percent, where better plans with smaller population deviations were presented and where the variances were not sufficiently justified as "necessary" to achieve legitimate state interests); *see also Wells v. Rockefeller*, 394 U.S. 542 (1969) (rejecting plan with total deviation of 13.1 percent); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) (rejecting redistricting plan with total deviation 5.97 percent); *White v. Weiser*, 412 U.S. 783, 790 (1973)

(rejecting plan with total deviation of 4.13 percent); *see generally id.* (congressional districts must be "as mathematically equal as reasonably possible"); *Karcher*, 462 U.S. at 732 ("As between two standards -- equality and something less than equality -- only the former reflects the aspirations of Art. I § 2").

It would be an odd rule that required the Secretary to generate data that, in his informed judgment and that of outside experts, were not accurate and that (due to known undercounts) would lead inexorably and unnecessarily to constitutionally intolerable departures from equal representation. Just as government officials have the power to take measures to avoid becoming "passive participant[s]" in unconstitutional conduct, *see City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989), the Secretary must be presumed to have at least the discretion (if not the duty) to avoid decisions that will lead to unconstitutional State action. *Cf. California State Senate v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992) ("if the State knows the census data are unrepresentative, it . . . should utilize noncensus data . . . in the redistricting process").

Fulfilling this role is all the more compelling since the individuals most likely to be excluded from an uncorrected census count are members of the racial and ethnic minority groups that have historically been denied full participation in the political process. Indeed, Congress, by enacting the Voting Rights Act of 1965, 42 U.S.C. §§ 1971 *et seq.*, committed the government to "rid[ding] the country of racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 365 (1966), a national commitment that extends to prohibiting all practices and procedures that result in members of minority groups being denied an equal opportunity to elect candidates of their choice, *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Given the acknowledged strong state interest in drawing congressional districts that do not offend Section 2, *see Bush v. Vera*, 116 S. Ct. 1941, 1951-1952 (1996); *Miller v. Johnson*, 115 S. Ct. 2475, 2488 (1995); *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *see also Vera*, 116 S. Ct. at 1969 (O'Connor, J., concurring), this Court should be duly hesitant to interpret the Secretary's authority as not extending to steps necessary to provide accurate information so as to avoid statutory violations. *Voinovich v. Quilter*, 507 U.S. at 153-54 (1993) (explaining danger that minority group will be "packed" so as to dilute voting strength). *See generally Bob Jones University v. United States*.

B. An Inaccurate Census Would Raise Serious Constitutional Questions

Although the Secretary's ability to conduct a correct and fair census plainly implicates his constitutional power, it also raises serious questions as to his constitutional duty. Although this Court held in *Wisconsin* that Article I, as amended imposes no absolute duty to correct an undercount -- even a differential undercount, the question presented in *Wisconsin* was fundamentally different from the one that would arise were the Secretary compelled to conduct a census in 2000 that, in his and experts' judgment, was unjustifiably and differentially inaccurate.

In *Wisconsin*, the Court upheld as a constitutionally permissible exercise of the Secretary's authority his decision not to rely on data generated through statistical sampling. Key to the Court's holding was that while Article I's goal of "equal representation" necessarily contemplates an accurate census, it does not express a preference for a particular type of accuracy. Because the executive decision challenged in *Wisconsin* had invoked concerns about "distributive" *i.e.*, State-level, inaccuracy, the Court concluded that there was no basis for

adjudging it less "consistent with the constitutional goal of equal representation" than one that favored accuracy at the national level. *See* 517 U.S. at 18 ("we can see no ground for preferring numerical accuracy to distributive accuracy. The Constitution provides no instruction on this point").

Here, however, there is no similar choice between equally "constitutionally permissible course[s]." The "'polestar of equal representation'" *Wisconsin*, 517 U.S. at 13 (quoting *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 463 (1992)), would favor a census objectively more accurate in each of the constitutionally relevant respects, and there would be serious doubt as to whether a different one could meet even the deferential constitutional standard.

Conclusion

The decision below went to unfortunate lengths to detect a "limitation" on the Secretary's authority that (1) defies the plain meaning of the Census Act; (2) disregards this Court's decisions regarding judicial deference; and (3) is inconsistent with a common-sense understanding of legislative intent. Because the Secretary's decision to conduct a more fair and accurate census is wholly consistent with his statutory and constitutional responsibilities and is specifically intended to further goals of equal representation and nondiscrimination that are at the core of our constitutional democracy, the judgment of the District Court must be reversed.

Respectfully submitted,

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